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SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1963.

No. 774.

PHILIP CHARLES TESTA,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF.

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1. Petitioner was never informed by the District Judge, or indeed by anyone, that because of his conduct he would be instantly sentenced without the opportunity to defend. The fact that petitioner stated that he did not intend to answer any more questions of the United States Attorney —a statement for which he was not punished—does not justify the District Judge in not allowing petitioner or his counsel, who was retained less than two hours before sentence, to show his reasons why he did not wish to answer those questions or any more questions. The District Court did not even afford petitioner or his counsel the right to speak before sentence. *Green v. United States*, 365 U. S.

301. The question of immunity was presented to and argued before the court below without any objection by the Government that it was not raised in the District Court, and it was considered and disposed of on the merits by the court below.

2. To declare that any time one lifts the telephone to do or say something unlawful he thereby aids or abets the telephone company in violating the Federal Communications Act, or causes it to do so, is an unreasonable extension of that Act.

Unlike other immunity statutes where the subject matter is readily identifiable [see Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1611-1612], since nearly everyone uses the telephone (U. S. Br., p. 4, footnote 1), the Government's argument that the use of the telephone by the witness for an unlawful purpose is in itself a sufficient showing that a possible violation of the Federal Communications Act is involved, will, unless condemned by this Court, have the effect of creating a general immunity statute.

A reading of § 409 of the Federal Communications Act does not permit such extension of the statute. A reasonable interpretation of the words, "books, papers, schedules of charges, contracts, agreements, and documents", supports the view that testimony involving only *real* violations of this Act was intended to produce immunity, not every offense in Title 18, U. S. C., merely because the telephone was used without the slightest intention of willfully causing the telephone company to violate its tariffs.

In the hands of a zealous prosecutor, behind closed doors, citizens who use the telephone now—not in 1984—would have to answer all questions asked of them because they have become "immunized": the prosecutor need only ask the witness before the grand jury a few questions concerning use of his telephone and declare that there is an

investigation of possible violations of the Federal Communications Act as well as other criminal statutes.

For the foregoing additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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